IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Edward S. Danks, Sr. and Georgianna Danks, Land Owners, Plaintiffs, v. Ryan Zinke, Secretary of the Department of Interior, United States Department of the Interior, Bureau of Indian Affairs, and the United States of America, Defendants.	Case No. 1:17-cv-115 RESPONSE TO THE UNITED STATES' MOTION TO DISMISS & SUPPORTING MEMORANDUM

COMES NOW Plaintiffs, Edward S. Danks, Sr. and Georgianna Danks through counsel, Don Bruce, and file their Response to the United States Motion to Dismiss and Supporting Memorandum.

INTRODUCTION

In a letter dated October 7, 2015, Thomas Wells, Deputy Superintendent, Forth Berthold Agency, BIA, (BIA Agency) correctly denied Slawson's request to correct the "clerical error." In his October 7, 2015 letter, Thomas Wells stated Slawson failed to comply with 25 C.F.R. § 2.9 and § 2.12. Thomas Wells' decision in his October 7, 2015 letter was adverse to Slawson.

Pursuant to 25 C.F.R. § 2.9 Slawson had 30 days to file an appeal to correct the Grant of Easement for Right of Way (ROW), dated October 29, 2013, and 25 CFR § 2.12, to notify all interested parties. Slawson failed to comply with 25 C.F.R. § 2.9 and § 2.12. Slawson then made a request to the Fort Berthold Agency, dated August 6, 2015, seeking BIA action for correction of a "clerical error" appearing on the face of ROW 799. Thomas Wells reversed his earlier decision denying Slawson's appeal. Thomas Wells relinquished his jurisdiction to take anymore action on the issue under 25 C.F.R. § 2.9 and § 2.12, in his October 7, 2015. Slawson was required to appeal to the Interior Board of Indian Appeals (IBIA).

The Agency correctly denied Slawson's request to correct a clerical error. The Agency and here the United States of America was without jurisdiction to make any corrections to a perceived "clerical error." The agency did not have jurisdiction for two reasons. One is because Slawson failed to comply with 25 C.F.R. § 2.9 and § 2.12. The second reason is because Exhaustion of tribal court remedies under National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985). Plaintiffs Danks filed an action in the Mandan Hidatsa Arikara (MHA) District Court (Tribal Court).

Plaintiffs Danks have continually challenged the jurisdiction of the Bureau of Indian Affairs (BIA) Agency throughout the process. Attorneys for the Defendants will have the Court believe that this Court lacks jurisdiction because Plaintiff's did not exhaust administrative remedies. Plaintiffs argued all along it was the (BIA) Agency who lacked subject jurisdiction to make its ruling to correct a "clerical error."

ARGUMENT

SUBJECT MATTER JURISDICTION

In this action, the BIA Agency lacked subject matter jurisdiction to take any action for Slawson pursuant to 25 C.F.R. § 2.9 and § 2.12. Slawson did not raise the issue of the perceived "clerical error" within the time limit. It was Slawson who failed to exhaust administrative remedies. Slawson was required to appeal to the IBIA. The BIA Agency did not have subject matter jurisdiction to initially consider Slawson's "clerical error" appeal, yet Defendants allowed Slawson's appeal. A district court's, in this case the BIA Agency, determination of subject-matter jurisdiction is generally reviewed *de novo. Williams v. Wynne,* 533 F.3d 360, 364-65 (5th Cir.2008). Plaintiffs bear the burden of establishing subject-matter jurisdiction. *Castro v. United States,* 560 F.3d 381, 386 (5th Cir. 2009). This Court must find the BIA Agency committed reversible error in its determination to correct the "clerical error" as the BIA Agency lacked subject matter jurisdiction for agency review under 25 C.F.R. § 2.9 and § 2.12.

"Without jurisdiction over the person or the res, the court cannot render a valid judgment, even if it has subject-matter jurisdiction." 2 J. Moore and J. Lucas, Moore's Federal Practice, ¶ 4.02[3], at p. 4-66 (2d ed. 1991) [Footnote omitted]. Sieg v. Karnes, 693 F.2d 803,807 (8th Cir. 1982). A judgment is void if the court entering the judgment did not have subject matter jurisdiction. Rolette Cnty. Soc. Serv. Bd. v. B.E., 2005 ND 101, ¶ 6, 697 N.W.2d 333 (citing McKenzie Cnty. Soc. Serv. Bd. v. C.G., 2001 ND 151, ¶ 10, 633 N.W.2d 157). "Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action . . . ." Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 57, 785 N.W.2d 863 (quoting Albrecht, 1998 ND 132, ¶ 10, 580 N.W.2d 583). Subject matter jurisdiction is derived from the constitution and laws and cannot be conferred by agreement, consent, or waiver. Id. (citing Albrecht, at ¶ 10). "When the jurisdictional facts are not in dispute, the question of subject-matter jurisdiction is a question of law, and we review the jurisdiction decision de novo." Rolette

Cnty. Soc. Serv. Bd., at ¶ 6. The BIA Agency's decision to correct the "clerical error is void.

The BIA Agency serves as a quasi-judicial body as a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action. *West's Encyclopedia of American Law*, edition 2. Copyright 2008 The Gale Group, Inc. When a court, BIA Agency here, lacks personal and subject matter jurisdiction, and the judge or court knowingly issues orders, all of its orders are void based on the fact that there was no personal or subject matter jurisdiction. The judge commits unlawful activity under a Code of Judicial Conduct, and the unlawful activity is a violation of the penalized party's due process rights. Johnson v. Zerbst, 304 U.S. 458 (1938). "The law is well settled that a **void** order or judgment is **void** even before reversal." Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920).

> Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply **VOID, AND THIS EVEN PRIOR TO REVERSAL**.

Old Wayne Mut. I. Assoc. v. MsDonough, 204 U.S. 8 (1850). [emphasis added]. Here the BIA Agency's reversal of its October 7, 2015 letter is void and Slawson, not Plaintiffs in this action, was required to appeal to the IBIA.

EXHAUSTION OF TRIBAL COURT REMEDIES

Plaintiffs continually argued they filed a law suit against Slawson in the MHA District Court, and that the BIA Agency, as a quasi judicial body, must "stay its hand" in taking any action regarding the Slawson's claim the BIA Agency made a "clerical error. National Farmers Union. *supra*. Defendants cite *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) in support of their argument to dismiss arguing Plaintiffs failed to exhaust administrative remedies. Plaintiff make the same argument that Slawson failed to exhaust tribal court remedies under National Farmers Union. *supra*. How can Defendants argue that the *Reiter* decision be enforced, and not enforce the *National Farmers Union* decision.

In establishing the tribal court exhaustion principle, the U.S. Supreme Court said, "We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union*, citing *New Mexico v. Mescalero Apache Tribe,* 462 U.S., at 332, 103 S.Ct., at 2385; *Merrion v. Jicarilla Apache Tribe,* 455 U.S., at 138, n. 5, 102 S.Ct., at 902, n. 5; *White Mountain Apache Tribe v. Bracker,* 448 U.S., at 143-144, and n. 10, 100 S.Ct., at 2583-2584 and n. 10; *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974); *Williams v. Lee,* 358 U.S., at 223, 79 S.Ct., at 272.

"But there is no provision of treaty, and no statute, which takes away from the [MHA] jurisdiction of a case like this, a question of property strictly internal to the [MHA] nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States," or to the BIA Agency. *National Farmers Union*, citing 7 Op.Atty.Gen. 175, 179-181 (1855).

CONCLUSION

Plaintiffs here filed an appeal to the IBIA, and it was mailed to one of the addresses provided by the Great Plains Regional Director, Aberdeen, South Dakota. The IBIA had constructive notice of the appeal. However, for the reasons argued this case must not be dismissed for the two reasons Plaintiffs argued. (1) the BIA Agency lacked subject matter jurisidiction, and (2) Slawson is required to exhaust MHA tribal court remedies pursuant to *National Farmers Union*.

DATED September 19, 2017.

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